A

Majlis Angkatan Tentera Malaysia v Mohd Nurul Ami bin Mohd Basri

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-01(NCVC)(W)-315–09 OF 2017
ABDUL RAHMAN SEBLI, ZALEHA YUSOF AND SURAYA OTHMAN JJCA
11 JANUARY 2019

C

Armed Forces — Misconduct — Offence under Armed Forces Act 1972 — Respondent charged under s 51 of the Armed Forces Act 1972 — Being involved in drug abuse — Issue on applicable guideline for urine test — Whether 'Perintah Majlis Angkatan Tentera 4/2009' ('army guideline') or 'Garis Panduan Bahagian Kesihatan Perkembangan Perubatan Kementerian Kesihatan Malaysia Bilangan 6/2002' ('KKM guideline') applicable — Whether army guideline had force of law — Whether KKM guideline had force of law

D

E *Civil Procedure — Originating summons — Declaratory orders — Applicable guideline for urine test involving members of armed forces — Whether 'Perintah Majlis Angkatan Tentera 4/2009' ('army guideline') or 'Garis Panduan Bahagian Kesihatan Perkembangan Perubatan Kementerian Kesihatan Malaysia Bilangan 6/2002' ('KKM guideline') applicable — Whether army guideline had force of law*

F *— Whether KKM guideline had force of law — Whether respondent correct in filing originating summons — Whether respondent abused court process*

The respondent was charged in the court martial for breaching the Armed Forces Standing Order ie for being involved in drug abuse, which was an

G offence under s 51 of the Armed Forces Act 1972 ('the Act'). The issue arose in the court below was over how many bottles of urine sample was required to be taken for the purpose of urine test. Under the 'Perintah Majlis Angkatan Tentera 4/2009' ('the army guideline'), only one bottle was required whereas under the 'Garis Panduan Bahagian Kesihatan Perkembangan Perubatan

H Kementerian Kesihatan Malaysia Bilangan 6/2002' ('the KKM guideline'), two bottles were required. In the respondent's case, only one bottle of his urine sample was taken, which tested positive for the drugs methamphetamine and amphetamine. The learned judge ruled that it was the KKM guideline that applied and not the army guideline. The issue for consideration in the present

I appeal was which guideline applicable for the purpose of conducting the urine test, the army guideline or the KKM guideline. If it was the KKM guideline that must be followed, two bottles must be taken since the screening and confirmation were done in two different places, but if the army guideline applied, only one bottle was required. The appellant had also raised the issue

that the respondent's application for declaratory reliefs was premature as his case before the court martial was ongoing. A

Held, allowing the appeal and setting aside the decision of the High Court with costs of RM5,000:

B

(1) Based on para (c)(i) of the KKM guideline, only one bottle of urine was required, but a 'duplicate' ie a second bottle was required if the screening and confirmation were done in two different places. What was important was for the single bottle to contain at least 30ml of urine sample. Similar with the KKM guideline, the army guideline required only one bottle of urine specimen to be taken and each bottle to contain at least 30ml of urine specimen. Basically, the requirements of both guidelines were the same (see paras 12 & 15). C

(2) The army guideline was made under s 15 of the Act read together with art 137 of the Federal Constitution. By virtue of s 15 of the Act, the Armed Forces Council was empowered by law to make regulations it may think necessary or expedient for the better carrying into effect of the Act, and this includes issuing the army guideline, which was issued by way of the 'Perintah Majlis Angkatan Tentera'. Being made by authority of the Armed Forces Council, the army guideline was therefore valid and enforceable (see paras 26–27 & 29). D E

(3) The KKM guideline did not have the force of law because unlike the army guideline, it was not made under any written law. The KKM guideline was merely a guideline issued by the Ministry of Health through a circular dated 3 September 2002 and signed by the Director General of the Ministry of Health. The fact that the KKM guideline made references to the Dangerous Drugs Act 1952 as observed by the court in *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460 did not clothe it with the force of law. Paragraphs 1 and 2 of the circular fortified the view that it was merely an administrative guideline with no force of law (see paras 30–32). F G

(4) Since the procedure adopted by the appellant in taking only one bottle of the respondent's urine specimen for his urine test was in accordance with the army guideline, the question that the appellant had breached the KKM guideline by not taking two bottles of his urine sample did not arise (see para 34). H

(5) In any event, even if the KKM guideline had the force of law, it could not supersede the army guideline. This was because the army guideline was a specific guideline which was meant to be enforced by the armed forces only and by no others and it was enforceable against all members of the armed forces without any exception (see para 35). I

(6) The appellant should have waited for the court martial to be completed before filing any action in the High Court. The court martial must be allowed to complete its hearing, and if the respondent was dissatisfied with the decision at the conclusion of the proceedings, his remedy was to apply for a review under s 128 of the Act. By filing the originating summons in the midst of the court martial, the respondent was clearly abusing the process (see paras 36–37).

[Bahasa Malaysia summary

Responden telah dituduh di Mahkamah Tentera kerana melanggar Perintah Mesyuarat Angkatan Tentera iaitu kerana terlibat dalam penyalahgunaan dadah, iaitu satu kesalahan di bawah s 51 Akta Angkatan Tentera 1972 ('Akta tersebut'). Isu yang timbul di mahkamah bawahan adalah mengenai bilangan botol sampel air kencing yang perlu diambil bagi tujuan ujian air kencing. Di bawah 'Perintah Majlis Angkatan Tentera 4/2009' ('garis panduan tentera'), hanya satu botol diperlukan manakalan di bawah 'garis Panduan Bahagian Kesihatan Perkembangan Perubatan Kementerian Kesihatan Malaysia Bilangan 6/2002' ('garis panduan KKM'), dua botol diperlukan. Dalam kes responden, hanya satu botol sampel air kencingnya telah diambil, yang telah diuji positif untuk dadah methamphetamine dan amphetamine. Hakim yang bijaksana telah memutuskan bahawa garis panduan KKM adalah terpakai dan bukan garis panduan tentera. Isu untuk pertimbangan dalam rayuan ini adalah garis panduan yang mana terpakai bagi tujuan menjalankan ujian air kencing, garis panduan tentera atau garis panduan KKM. Jika ia adalah garis panduan KKM yang perlu diikuti, dua botol mesti diambil semasa pemeriksaan dan pengesahan dibuat di dua tempat berbeza, tetapi jika garis panduan tentera terpakai, hanya satu botol diperlukan. Perayu juga telah menimbulkan isu bahawa permohonan responden untuk relif deklarasi adalah pramatang kerana kesnya di hadapan Mahkamah Tentera masih berjalan.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi dengan kos RM5,000:

(1) Berdasarkan perenggan (c)(i) Garis Panduan KKM, hanya satu botol air kencing diperlukan, tetapi 'duplicate' iaitu botol kedua diperlukan jika pemeriksaan dan pengesahan dibuat di dua tempat berbeza. Apa yang penting adalah agar satu botol itu mengandungi sekurang-kurangnya 30ml sampel air kencing. Sepertimana garis panduan KKM, garis panduan tentera menghendaki hanya satu botol spesimen air kencing diambil dan setiap botol perlu mengandungi sekurang-kurangnya 30ml spesimen air kencing. Pada amnya, keperluan kedua-dua garis panduan adalah sama (lihat perenggan 12 & 15).

(2) Garis panduan tentera dibuat di bawah s 15 Akta tersebut dibaca bersama perkara 137 Perlembagaan Persekutuan. Menurut s 15 Akta tersebut, Majlis Angkatan Tentera diberi kuasa oleh undang-undang untuk

membuat peraturan yang difikirkannya perlu atau sesuai dalam menjalankan Akta tersebut dengan lebih berkesan, dan ini termasuklah mengeluarkan garis panduan tentera, yang dikeluarkan melalui perintah Majlis Angkatan Tentera. Oleh kerana dibuat melalui kuasa Majlis Angkatan Tentera, garis panduan tentera dengan itu adalah sah dan boleh dikuatkuasakan (lihat perenggan 26–27 & 29).

(3) Garis Panduan KKM tidak mempunyai kuasa undang-undang kerana bukan seperti garis panduan tentera, ia tidak dibuat di bawah mana-mana undang-undang bertulis. Garis panduan KKM hanya suatu garis panduan yang dikeluarkan oleh Kementerian Kesihatan melaui pekeliling bertarikh 3 September 2002 dan ditandatangani oleh Ketua Pengarah Kementerian Kesihatan. Hakikat bahawa garis panduan KKM membuat rujukan kepada Akta Dadah Berbahaya 1952 sepertimana diteliti oleh mahkamah dalam kes *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460 tidak memberikannya kuasa undang-undang. Perenggan-perenggan 1 dan 2 pekeliling itu memberi pandangan bahawa ia hanya garis panduan pentadbiran tanpa kuasa undang-undang (lihat perenggan 30–32).

(4) Oleh kerana prosedur yang diguna pakai oleh perayu kerana mengambil hanya satu botol spesimen air kending responden untuk ujian air kencingnya adalah menurut garis panduan tentera, persoalan bahawa perayu telah melanggar garis panduan KKM kerana tidak mengambil dua botol spesimen air kencingnya tidak timbul (lihat perenggan 34).

(5) Dalam apa keadaa, jika pun garis panduan KKM mempunyai kuasa undang-undang, ia tidak boleh mengatasi garis panduan tentera. Ini adalah kerana garis panduan tentera adalah garis panduan spesifik yang bermaksud untuk dikuatkuasakan oleh angkatan tentera hanya dan oleh mereka sahaja dan bukan sesiapa yang lain dan ia boleh dikuatkuasakan terhadap semua anggota angkatan tentera tanpa apa-apa pengecualian (lihat perenggan 35).

(6) Perayu sepatutnya menunggu Mahkamah Tentera untuk selesai sebelum memfailkan apa-apa tindakan di Mahkamah Tinggi. Mahkamah Tentera hendaklah dibenarkan menyelesaikan perbicaraannya, dan jika responden tidak berpuas hati dengan keputusan prosiding itu, remedinya adalah untuk memohon semakan di bawah s 128 Akta tersebut. Dengan memfailkan saman pemula semasa Mahkamah Tentera sedang berjalan, responden jelas telah menyalahgunakan proses mahkamah (lihat perenggan 36–37).]

Notes

For a case on offence under Armed Forces Act 1972, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2341.

A For cases on originating summons in general, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6747–6845.

Cases referred to

B *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460, CA (not folld)

Legislation referred to

Armed Forces Act 1972 ss 15, 51, 115, 128
Dangerous Drugs Act 1952 ss 15(1)(a), 38B(1)
C Drug Dependents (Treatment and Rehabilitation) Act 1983
Federal Constitution arts 5(1), 8(1), 137
Police Act 1967 s 97
Rules of Court 2012 O 18 r 19(1)(b), (1)(d)

D **Appeal from:** Originating Summons No AA-24NCVC-167–04 of 2017 (High Court, Ipoh)

Kogilambigai a/p Muthusamy (Senior Federal Counsel, Attorney General's Chambers) for the appellant.
E *Manjit Singh Man (Manjit Singh Man & Co) for the respondent.*

Abdul Rahman Sebli JCA (delivering judgment of the court):

F **[1]** This appeal was against the decision of the High Court at Ipoh allowing the respondent's application by way of originating summons for the following declaratory orders:

(a) the 'Perintah Majlis Angkatan Tentera 4/2009' ('the army guideline') dated 14 May 2009 which lays down the procedure for testing drug abuse in urine is null and void as it does not conform to the 'Surat Pekeliling Ketua Pengarah Kesihatan Malaysia, Kementerian Kesihatan Malaysia' dated 3 September 2002 and Garis Panduan Bahagian Kesihatan Perkembangan Perubatan Kementerian Kesihatan Malaysia Bilangan 6/2002' ('the KKM guideline'); and

H (b) the army guideline is null and void as it violates arts 5(1) and 8(1) of the Federal Constitution.

[2] The issue relates to the procedure for the taking of urine specimens for I the purposes of urine tests in suspected drug abuse cases involving members of the armed forces.

[3] It needs to be mentioned that when the originating summons was filed by the respondent, his trial in the court-martial was ongoing. This prompted

the appellant to apply under O 18 r 19(1)(b) and/or (d) of the Rules of Court 2012 to strike out the originating summons on the ground that it was scandalous, frivolous or vexatious or was otherwise an abuse of process. The application was dismissed by the learned High Court judge.

[4] In allowing the respondent's originating summons and dismissing the appellant's striking out application, the learned judge accepted the respondent's argument that the army guideline is null and void and of no effect as it did not conform to the KKM guideline.

[5] The decision effectively means that the urine test carried out by the appellant on the respondent was illegal as only one bottle of urine sample was taken from him instead of two as required by the KKM guideline. The decision also means that the appellant will not be able to continue with the court-martial against the respondent.

[6] The background facts leading to the present appeal are as follows. On 9 July 2016, the respondent was charged in the court-martial for breaching the Armed Forces Standing Order, which is an offence under s 51 of the Armed Forces Act 1972 ('the AFA'). The breach was for being involved in drug abuse. The material particulars of the charge against the respondent read:

> TIDAK MEMATUHI PERINTAH TETAP YANG BERTENTANGAN DENGAN SEKSYEN 51 AKTA ANGKATAN TENTERA 1972
>
> Iaitu ia di 2 Skuadron Semboyan Diraja, Kem Remilies, 30450 IPOH, Perak pada April 2015 jam lebih kurang 0120 telah melanggar Perintah Bahagian Pertama Pasukan, Bilangan No 28 bertarikh 11 Februari 2015 telah memberi sampel air kencingnya yang bertanda 'A' kepada 724310 LUK Mohd Firdaus bin Zaman Shah dan apabila diuji oleh Makmal Jabatan Kimia Malaysia Jalan Sultan Azlan Shah, 31400 Ipoh Nombor Rujukan 15-FR-A-02029 bertarikh 25 Mei 2015 pada 27 April 2015 jam lebih kurang 1133 didapati sampel air kencingnya tersebut mengandungi dadah jenis *Methamphetamine* dan *Amphetamine* iaitu sejenis dadah.

[7] Section 51 of the AFA under which the respondent was charged provides as follows:

> 51 Disobedience to standing orders
>
> (1) Every person subject to service law under this Act who contravenes or fails to comply with any provision of orders to which this section applies, being a provision known to him or which he might reasonably be expected to know, shall, on conviction by court-martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act.
>
> (2) This section applies to standing orders or other routine orders of a continuing nature for any formation or unit or body of troops, or for any command or other area, establishment, garrison or place, or for any ship, train or aircraft.

A (3) The standing orders or other routine orders described in subsection (2) may be —

(a) made by; and

(b) published in such manner as may be determined by, the Service Chief for each Service or any officer authorized by him.

B

[8] The dispute that arose was over how many bottles of urine sample was required to be taken for the purposes of a urine test. Under the army guideline, only one bottle is required whereas under the KKM guideline, two bottles are required.

C

[9] In the case of the respondent, only one bottle of his urine sample was taken, which tested positive for the drugs methamphetamine and amphetamine. It was this test result that formed the basis for the charge against him. It was therefore important for the court to determine if the procedure adopted by the appellant in collecting urine samples for the purposes of urine tests was in accordance with the law.

D

E **[10]** In a court-martial, the rules of evidence are the same as those observed in a civil court. This is provided by s 115 of the AFA which reads:

115(1) Save as otherwise provided in this Act, the rules of evidence to be observed in proceedings before courts-martial shall be the same as those which are observed in civil courts in Malaysia and no person shall be required in proceedings before a court-martial to answer any question or to produce any document which he could not be required to answer or to produce in similar proceedings before a civil court in Malaysia.

F

G **[11]** The question before us was simply this — which guideline applies, the army guideline or the KKM guideline? The learned judge ruled that it is the KKM guideline that applies and not the army guideline. The KKM guideline, inter alia, provides for the following procedure in the collection of urine samples:

H (c) Collection Procedure

(i) At least 30 ml urine sample shall be collected in one bottle or duplicate if screening and confirmation are done in two different places. The requesting officer/referring centre shall keep the second urine sample and shall send the urine sample to the confirmation centre if the screening result is positive.

I

(ii) Both the collection personnel and the donor shall keep the urine samples in view at all times prior to it being sealed or labeled. If the second bottle cannot be provided (sample is 30 ml only), testing shall be done on the first sample, Absence of second sample shall be recorded.

(iii) At the collection site, if the volume is less than 30 ml, the donor may be given a reasonable amount of liquid to drink eg 240 ml of water every 30 minutes, but not to exceed a maximum of 720 ml. The second urine sample shall be collected and mixed with the previous sample, by the donor himself/herself or the collection personnel in front of the donor.

(iv) Type of bottle used for sample collection should be disposable in nature.

(v) During collection, if adulteration of urine sample is suspected, the collection personnel shall collect another urine sample and both urine samples shall be sent to the laboratory.

(vi) The collection personnel shall stand close enough to the donor to see that the urine is genuinely passed out from the person and to see that there is no attempt to falsify the specimens.

(vii) After the urine is collected, the bottles shall be securely capped and labelled as follows:

Name: .....

I/C No: .....

Date of Collection: .....

[12] Learned counsel for the respondent contended that this guideline requires two bottles of urine sample to be taken. We read it differently. Our reading of para (c)(i) is that only one bottle of urine specimen is required, but a 'duplicate' ie a second bottle is required if the screening and confirmation are done in two different places. What is important is for the single bottle to contain at least 30ml of urine sample.

[13] Paragraph (c)(iii) of the KKM guideline expressly requires that if at the collection site the volume is less than 30ml, the donor may be given a reasonable amount of liquid to drink eg 240ml of water every 30 minutes, but not to exceed a maximum of 720ml, and the second urine sample shall be collected and mixed with the previous sample by the donor himself/herself or the collection personnel in front of the donor.

[14] For a comparison of the KKM guideline with the army guideline, we reproduce below the relevant parts of the army guideline:

6. *Proses Pungutan*. Semua proses pungutan specimen air kencing perlu mematuhi prosedur dan langkah-langkah keselamatan. Urutan kejadian bagi perlaksanaan pungutan specimen air kencing melalui beberapa proses seperti berikut:

...

e. *Pemilihan Botol*. Pemberi/suspek hendaklah memilih sendiri botol ujian yang disediakan. Setelah pemberi/suspek memilih botol tersebut, Pendaftar hendaklah menulis Nombor Kad Pengenalan/Nombor Tentera anggota pemberi/suspek di

botol tersebut dengan menggunakan pen dakwat kekal (*permanent marker pen*). Ini bagi memastikan pemberi/suspek menggunakan botol yang sama semasa menyerahkan air kencing untuk diuji.

f. *Kapasiti Air Kencing*. Pendaftar hendaklah memaklumkan kepada pemberi/suspek dikehendaki memberi specimen air kencing sekurang-kurangnya 30 ml bagi setiap botol. Sekiranya pemberi/suspek memberi kurang daripada 30 ml atau tidak boleh terkencing, pemberi/suspek boleh diberi minuman dalam amaun yang berpatutan iaitu lebih kurang 240 ml air bagi setiap lebih kurang 30 minit tetapi tidak boleh melebihi 720 ml.

...

l. *Ujian Saringan*. Sebelum membuat ujian saringan, Penguji Saringan hendaklah terlebih dahulu memastikan Nombor Kad Pengenalan/Nombor Tentera yang tertera di botol tersebut kepunyaan anggota pemberi/suspek berkenaan. Pemberi/suspek dikehendaki membuka sendiri penutup botol specimen air kencingnya. Penguji Saringan akan membuat pengujian ke atas specimen air kencing dengan mematuhi tatacara penggunaan alat ujian saringan air kencing, Kaedah ujian adalah seperti berikut:

(1) *Penggunaan Botol Yang Dilengkapi Kertas-Kertas Ujian Saringan Dadah.* Sekiranya ujian menunjukkan keputusan positif dadah berbahaya botol tersebut hendaklah dilabel dan dimeterai (seal) seterusnya dihantar ke Pusat Pengujian.

(2) *Penggunaan Botol dan Alat Ujian Saringan Dadah yang Berasingan.* Bungkusan alat ujian saringan hendaklah dibuka di hadapan pemberi/suspek. Setelah alat ujian saringan dicelup ke dalam botol, botol tersebut hendaklah ditutup semula sementara menunggu keputusan ujian saringan, sekiranya ujian saringan didapati positif botol tersebut hendaklah dilabel dan dimeterai seterusnya dihantar ke Pusat Pengujian.

(3) *Pungutan Semula.* Pungutan semula specimen air kencing boleh dilaksanakan sekiranya perlu.

[15] As is the case with the KKM guideline, the army guideline requires only one bottle of urine specimen to be taken. And like the KKM guideline, the army guideline also requires each bottle to contain at least 30ml of urine specimen. So basically the requirements of both guidelines are the same.

[16] The respondent himself accepted that the taking of two bottles ('duplicate') of urine sample as laid down by the KKM guideline is only required if the screening and confirmation are done in two different places. This can be deduced from para (7) of his affidavit in support where he said:

(7) Pada 26 April 2015, Cawangan Penyiasatan Khas Angkatan Tentera Malaysia telah menjalankan satu Operasi Cegah Dadah di pasukan 2 Skuadron Semboyan Di Raja, Jalan Hospital, 30450 Ipoh, Perak. Dalam operasi tersebut, *hanya satu (1) botol sampel air kencing sahaja dipungut daripada saya* dan daripada setiap anggota

pasukan 2 Skuadron Semboyan Di Raja tersebut yang hendak diuji sampel air kencingnya *walau pun ujian saringan dan ujian penentuan dibuat di dua (2) tempat yang berlainan*. Ini adalah kerana Cawangan Penyiasatan Khas Angkatan tentera Malaysia mengikut garis panduan yang di keluarkan oleh Perintah Majlis Angkatan Tentera Bilangan 4 tahun 2009 tersebut di perenggan 6(i) yang menyatakan bahawa satu (1) botol sampel air kencing adalah mencukupi untuk dipungut daripada setiap anggota. (Emphasis added.)

[17] The respondent was merely echoing what para (c)(i) of the KKM guideline requires, ie that since the screening and confirmation were done in two different places, two bottles of his urine sample should have been taken by the appellant instead of just one. Going by the terms of para (c)(i) of the KKM guideline, we would agree with him.

[18] But that is not the end of the matter. The question is not whether one or two bottles should be taken, but whether the procedure to be followed by the appellant is the KKM guideline or the army guideline. If it is the KKM guideline that must be followed, two bottles must be taken (since the screening and confirmation were done in two different places) but if the army guideline applies, only one bottle is required.

[19] The respondent gave two reasons why the appellant must follow the KKM guideline and not the army guideline, and they are as follows:

(a) the KKM guideline is a guideline that has been issued to all enforcement agencies involved in the programme to detect drug abuse, including the armed forces; and

(b) the guideline is based on the procedure adopted internationally, which mandatorily requires for two bottles of urine sample to be taken for the purposes of a urine test.

[20] We were referred by learned counsel for the respondent to the decision of this court in *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460 where it was held that the KKM guideline has the force of law. The facts are these. The appellant, a policeman, was charged in the magistrates court with the offence of consuming proscribed drug under s 15(1)(a) of the Dangerous Drugs Act 1952 read with s 38B(1) of the same Act.

[21] He was convicted and sentenced to seven months imprisonment. The conviction was affirmed by the High Court. On a successful appeal to this court, he was acquitted and discharged of the offence.

[22] Like the respondent in the present appeal, his urine sample tested positive for methamphetamine. His complaint was also similar, ie only one

bottle of urine sample was taken from him for the purposes of a urine test. This according to the appellant was in breach of the Inspector General of Police Standing Order F103 ('the IGSO') which requires two bottles (the army guideline requires only one bottle) to be taken, which is the same requirement as laid down by the KKM guideline.

[23] The prosecution argued that the IGSO and the KKM guideline, being merely administrative guidelines, had no force of law. The appellant argued otherwise. This court acceded to the appellant's argument. Zamani A Rahim JCA delivering the judgment of the court said at p 472:

> [39] There are several standing orders covering various police jobs such as the maintenance of station diaries, the procedure to hold an identification parade in criminal cases which is regulated by the IGSO Part D 226, and the procedure to collect urine samples from suspected drug dependents which is housed in the IGSO F103. The standing orders made by the Inspector-General of Police, which necessarily include the IGSO F103 acquires its statutory power from s 97 of the Police Act 1967. Therefore, it has the force of law.
>
> [40] The KKM guidelines Bilangan 6/2002 under the caption 'Urine Collection' has made reference to the Dangerous Drugs Act 1952. The scheme of the KKM guidelines Bilangan 6/2002 was formulated in collaboration with the Dangerous Drugs Act 1952 and also the Drug Dependents (Treatment and Rehabilitation) Act 1983.
>
> ...
>
> [42] Thus, s 31 of the Drugs Dependents (Treatment and Rehabilitation) Act 1983 must be read conjointly with ss 38A and 38B of the Dangerous Drugs Act 1952. Therefore, the KKM guidelines Bilangan 6/2002 which is formulated in line with both the aforesaid Acts and therefore it has the force of law.

[24] It is clear that the reason why the IGSO and the KKM guideline were held by this court to have the force of law was because they were either made under or were in line with the relevant laws, namely s 97 of the Police Act 1967 in the case of the IGSO and the Dangerous Drugs Act 1952 and the Drug Dependents (Treatment and Rehabilitation) Act 1983 in the case of the KKM guideline.

[25] On the authority *Noor Shariful Rizal*, the learned judge came to the following conclusion:

> [30] Dari keputusan Mahkamah Rayuan tersebut juga, nyatalah bahawa ketidakpatuhan defendan mengikuti garis panduan yang ditetapkan Kementerian Kesihatan Malaysia bukan sahaja menyebabkan prosedur pungutan dan pengendalian specimen air kencing di bawah Perintah 4/2009 tidak sah, malahan ianya juga bertentangan dengan hak keadilan asasi yang dijamin di bawah Perlembagaan Perskutuan. Mana mungkin plaintiff sebagai seorang anggota tentera

mendapat layanan yang berbeza berbanding dengan orang awam. Perbezaan tersebut tidak boleh dibenarkan wujud kerana akan menggugat hak asasi plaintif di bawah Perlembagaan Persekutuan. Plaintif tidak sewajarnya didiskriminasikan semata-mata kerana dia seorang anggota ATM. Plaintif berhak mendapat layanan yang sama rata di sisi undang-undang.

[26] What then is the status of the army guideline? Does it have any force of law? In our view it does. The first thing to note is that it was made under s 15 of the AFA read together with art 137 of the Federal Constitution ('the Constitution').

[27] The army guideline, which can be found at pp 70–80 of the appeal record is dated 14 May 2009 and was signed by the Secretary of the Armed Forces Council. He signed it 'Dengan Perintah Majlis Angkatan Tentera'. There can be no doubt therefore that the army guideline is a guideline that was issued pursuant to a power given by law.

[28] We reproduce below art 137 of the Constitution and s 15 of the AFA:

Article 137(1) of the Constitution:

137 Armed Forces Council

(1) There shall be an Armed Forces Council, which shall be responsible under the general authority of the Yang di-Pertuan Agong for the command, discipline and administration of, and all other matters relating to the armed forces, other than matters relating to their operational use.

Section 15 of the AFA:

15 Regulations governing commissioning, etc, of officers

The Armed Forces Council with the approval of the Yang di-Pertuan Agong may make regulations including regulations providing for matters *which may be issued by Perintah Majlis Angkatan Tentera* governing the commissioning and appointment of officers, their terms of service, including the absorption, attachment and secondment of any officer to any body, force or service, promotion, advancement in rank, retirement, resignation, dismissal and such other matters as the Armed Forces Council may think necessary or expedient for the better carrying into effect of the provisions of this Part. (Emphasis added.)

[29] Thus, by virtue of s 15 of the AFA, the Armed Forces Council is empowered by law to make regulations it may think necessary or expedient for the better carrying into effect of the AFA, and this includes issuing the army guideline, which was issued by way of the 'Perintah Majlis Angkatan Tentera'. Being made by authority of the Armed Forces Council, the army guideline is therefore valid and enforceable.

[30] What about the KKM guideline, does it have any force of law? With regret and with the greatest of respect to the panel of this court that decided *Noor Shariful Rizal*, we are unable to agree that the KKM guideline has the force of law. In the first place, unlike the army guideline, it was not made under any written law.

[31] The KKM guideline was merely a guideline issued by the Ministry of Health through a circular dated 3 September 2002 and signed by the Director General of the Ministry of Health. The fact that the KKM guideline makes references to the Dangerous Drugs Act 1952 as observed by this court in *Noor Shariful Rizal* does not clothe it with the force of law.

[32] Paragraphs 1 and 2 of the circular fortifies our view that it is merely an administrative guideline with no force of law. We reproduce below the two paragraphs which can be found at p 43 of the appeal record:

> SURAT PEKELILING KETUA PENGARAH KESIHATAN MALAYSIA BIL 6/2002 GARISPANDUAN BAGI UJIAN PENGESANANAN PENYALAHGUNAAN DADAH DALAM AIR KENCING
>
> 1. TUJUAN
>
> Surat ini bertujuan untuk memaklumkan mengenai garispanduan bagi ujian pengesanan penyalahgunaan dadah. Ini adalah untuk *menyeragamkan dan mengemaskini prosidur-prosidur ujian pengesanan dadah di makmal-makmal Kementerian Kesihatan Malaysia (KKM) serta sebagai panduan bagi agensi-agensi yang terlibat dalam program pengesanan dadah* seperti Agensi Dadah Kebangsaan dan Polis. Selain daripada itu garispanduan ini akan memudahkan proses menulis dokumen kerana terdapat penyeragaman prosedur bagi proses mendapatkan pensijilan ISO/IEC 17025 serta dapat menghasilkan keputusan ujian berkualiti dan diakui kerana semua prosidur dijalankan dengan mengambilkira isu keselamatan, kerahsiaan, kawalan kualiti dan berpandu kepada prosidur-prosidur di peringkat antarabangsa.
>
> 2. LATAR BELAKANG
>
> Garispanduan ini disediakan berlanjutan dari Bengkel Polisi dan Prosidur Ujian Dadah pada tahun 2000 di mana banyak pertanyaan mengenai polisi dan prosidur samada teknikal atau perundangan telah dikemukakan oleh peserta-peserta yang menghadiri bengkel itu.
>
> Berikutan dengan itu, satu Jawatankuasa Teknikal Polisi dan Prosidur telah diwujudkan yang dianggotai oleh Pakar Patologi, Pegawai Sains dan Juruteknologi Perubatan. Di bawah jawatankuasa ini terdapat dua jawatankuasa kerja iaitu, Jawatankuasa Polisi dan Prosidur Ujian Dadah serta Jawatankuasa *Quality Assurance* dan Latihan.
>
> Jawatankuasa Teknikal Polisi dan Prosidur Ujian Dadah telah mengadakan beberapa siri mesyuarat serta perbincangan dengan lain agensi seperti pihak Polis dan pihak Peguam Negara dan telah berjaya mengeluarkan satu garispanduan

Guidelines For Drugs Abuse Testing untuk rujukan makmal-makmal pengesanan dadah di Kementerian Kesihatan dan agensi-agensi berkaitan di negara ini. (Emphasis added.)

[33] It is patently clear that the purpose of the KKM guideline is to coordinate and update the procedure for the taking of urine samples in suspected drug abuse cases and as a guideline to the relevant agencies, including the armed forces. It was not meant to be a legal document having the force of law. For any guideline to have any force of law, it must be made pursuant to a power given by law. This is not the case with the KKM guideline.

[34] Since the procedure adopted by the appellant in taking only one bottle of the respondent's urine specimen for his urine test was in accordance with the army guideline, the question that the appellant had breached the KKM guideline by not taking two bottles of his urine sample does not arise, and this is so even if the KKM guideline has the force of law, and assuming we are wrong in holding the view that it has no force of law.

[35] In any event, even if the KKM guideline has the force of law, it cannot supersede the army guideline. This is because the army guideline is a specific guideline which is meant to be enforced by the armed forces only and by no others and it is enforceable against all members of the armed forces without any exception.

[36] The appellant also raised the issue that the respondent's application for declaratory reliefs was premature as his case before the court-martial was ongoing. We agree. The appellant should have waited for the court-martial to be completed before filing any action in the High Court.

[37] The court-martial must be allowed to complete its hearing, and if the respondent is dissatisfied with the decision at the conclusion of the proceedings, his remedy is to apply for a review under s 128 of the AFA. By filing the originating summons in the midst of the court-martial, the respondent was clearly abusing the process. This must not be countenanced by this court.

[38] It was for all the reasons aforesaid that we allowed the appellant's appeal against the High Court decision allowing the respondent's originating summons. We therefore ordered the decision of the High Court to be set aside. We awarded costs of RM5,000 to the appellant. The deposit was refunded.

Appeal allowed; decision of High Court set aside with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar